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July 25, 2008

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**Re: 1<sup>st</sup> Notice of Intent to Sue for Violations of RCW 42.17**

Dear elected officials:

We represent the following persons and entities ("Notifiers") in submitting this statutory notice of intent to sue:

- Hon. Washington Supreme Court Justice Robert F. Utter (Ret.).
- Hon. Washington Supreme Court Justice Faith Ireland (Ret.).
- A-1 Builders, a beneficiary of the Washington Builders Benefit Trust, operated by the Building Industry Association of Washington ("BIAW Trust").
- BIAW Trust Beneficiaries ("Beneficiaries"), a non-profit organization that includes and advocates for beneficiaries of the BIAW Trust.<sup>1</sup>

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<sup>1</sup> Notifiers A-1 Builders and BIAW Trust Beneficiaries believe that BIAW primarily funds its electoral activities with misappropriated trust funds from the BIAW Trust. BIAW receives these trust funds from the State of Washington through its Retrospective Rating ("retro") program, and agrees to hold these

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Notifiers have reason to believe that the Building Industry Association of Washington, acting independently and through its wholly owned and controlled subsidiary BIAW Member Services Corporation (collectively "BIAW"),<sup>2</sup> and the Master Builders Association of King and Snohomish Counties ("MBA") have violated certain sections of RCW Chapter 42.17.

Notifiers hereby give notice that they intend to bring a citizens' action against these entities under RCW 42.17.400(4) if you do not commence an action against these entities within the following notice periods specified by statute. At the expiration of 45 days from the date of this letter, a second notice of intent to sue will be sent to you if you have not yet filed suit against BIAW and MBA. If, after 10 days following receipt of the second notice, you still have not filed suit against these entities, Notifiers will bring an action against them in Superior Court.

The bases of Notifiers' belief that these entities have violated certain sections of RCW Chapter 42.17 are as follows:

**1. During the approximately 18 month period leading into the 2008 general election, BIAW qualifies as a political committee and has failed to file mandatory reports.**

For an approximately 18-month period leading up to the 2008 general election, BIAW meets the definition of a "political committee" under either prong of the applicable legal test. See *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn.App. 586 (2002), rev. denied, 148 Wn.2d 1020 (2003) ("EFF"); Public Disclosure Commission ("PDC") Interpretation No. 07-02. An organization may become a political committee by either (1) expecting to receive or receiving contributions to further electoral goals, or by (2) expecting to make or making expenditures to further electoral political goals. *Id.* To the second prong only, the courts have added an additional requirement that the organization must also have as its "primary or one of the primary purposes ... to affect, directly or indirectly, government decision making by supporting or opposing candidates or ballot propositions". *Id.*; *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 509 (1976).

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funds "in trust" for the approximately 6,000 employers in BIAW's retro program. BIAW has admitted that it is funding its political activities through a provision in the trust agreement allowing the trustees to transfer trust funds to affiliates "for marketing and promotion of the [retro] plan." A class action lawsuit filed by trust beneficiaries seeks accounting, preservation and restoration of trust funds, in part due to this breach of trust. A-I Builders and BIAW Trust Beneficiaries believe that the enforcement of RCW 42.17 will have the secondary benefit of assisting in accounting for and preserving trust funds for trust beneficiaries.

<sup>2</sup> Notifiers believe that when BIAW received contributions for electoral activities, BIAW Staff deposited them into accounts of BIAW Member Services Corporation ("MSC") and then made political contributions from such accounts. In such transactions MSC was not acting as a separate corporation but was used as a vehicle for BIAW to shield its transactions from public scrutiny. BIAW and MSC act as a single entity in this respect and both share liability for the violations discussed in this notice letter. Notifiers have additional evidence that they can provide on this subject upon request.

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**A. The BIAW meets the "receiving" prong of the political committee test because it solicited and received contributions for the 2008 governor's race.**

In the 18-months preceding the 2008 general election, BIAW's staff and officers solicited contributions from other non-profit corporations, including local building associations such as the MBA, to fund its 2008 electoral activities. The fundraising was focused on the 2008 governor's race. By July of 2007, the MBA reported that BIAW's "campaign war chest" had grown to "approximately \$3.5 million".<sup>3</sup>

The minutes of the June 29, 2007 BIAW Executive Committee included a report on BIAW's gubernatorial fundraising:

**President Doyle - Gubernatorial Fundraising**

Doyle mentioned that at BIAW's Board meeting in Spokane [June 16, 2006], a special fund was set up to raise funds for the 2008 gubernatorial races. At the Olympia meeting [Feb. 22, 2006] a plan was established. President Doyle said so far 12 Local Associations had signed on to the plan and others were still in consideration. *So far three-quarters of a million dollars had been raised.* Add that to the amount of BIAW's excess and the total combined amount would come to over \$2 million dollars. Daimon said clearly this is the one area where we will make a difference.<sup>4</sup> (emphasis added).

BIAW President Daimon Doyle spoke to MBA's Board on April 30<sup>th</sup>, 2007. The minutes stated that his purpose was to "ask the Association to donate ... to BIAW's election fund to support a gubernatorial candidate in 2008" and that 11 other organizations had done so.<sup>5</sup> On November 19, 2007, the MBA Board was told that BIAW had "moved another \$2 million of their budget to Dino Rossi campaign."<sup>6</sup>

A board member of another non-profit, the Spokane Homebuilders Association, testified to a similar story: "BIAW staff came to our local association and asked us whether we would contribute our portion of the refund to the gubernatorial race. We agreed upon that unanimously."<sup>7</sup>

As a non-profit corporation, BIAW is limited in its political expenditures and its tax returns are publicly accessible. For this reason, it is believed that BIAW staff operated the "campaign war chest" through the accounts of BIAW Member Services Corporation ("MSC"), a

<sup>3</sup> MBA's Chair Officers Meeting Minutes, July 23, 2007, MBA 656, Ex. A.

<sup>4</sup> BIAW EC Mtg. Minutes, June 29, 2007, BIAW 004662, Ex. B.

<sup>5</sup> MBA Board of Directors Meeting Minutes, April 30, 2007, MBA 1030, Ex. C.

<sup>6</sup> MBA Board of Directors Meeting Minutes, November 19, 2007, MBA 1323, Ex. D. In November, 2007, BIAW's Board formally endorsed Dino Rossi for governor. BIAW Board of Directors Meeting Minutes, November 9, 2007, BIAW 4669, Ex. E.

<sup>7</sup> Declaration of Adam Holmes ¶ 6, Ex. F.

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for profit corporation that keeps its financial transactions absolutely secret.<sup>8</sup> It is believed that the donations received by BIAW were deposited into the MSC accounts and expenditures were taken out of those accounts.

**B. BIAW also qualifies as a political committee under the "making expenditures" prong of the test.**

During the period leading up to the 2008 election, BIAW made and continues to make expenditures in furtherance of its political electoral goals and also has and continues to have as a "primary or one of the primary purposes ... to affect, directly or indirectly, government decision making by supporting or opposing candidates or ballot propositions."

According to news reports, in the past two months the BIAW has already spent over one million dollars on electoral communications in the 2008 governor's race. This includes television, radio and billboard advertising directed to voters. As described above, the BIAW has spent the last year fundraising for these expenditures. By the time it is through, BIAW's multi-million dollar campaign in the 2008 governor's race will likely be the largest independent expenditure campaign in Washington's history. It is conclusive evidence that electoral work is one of BIAW's primary organizational purposes during this period. By way of comparison, the BIAW's organizational expenses for 2006 totaled just \$1,158,884.<sup>9</sup>

The BIAW has routinely admitted that the 2008 governor's race is a top priority. For example, in its January 2008, newsletter, BIAW's President stated "One of my priority goals as the 2008 President of the Building Industry Association of Washington is to replace anti-small business and anti-affordable housing Governor Gregoire with her pro-small business and affordable housing challenger Dino Rossi."<sup>10</sup> Winning the 2008 elections was a primary purpose of BIAW even in 2007. As the BIAW's 2007 Annual Report stated:

*2007 was a year of preparation for the BIAW Political Program. With the mammoth presidential election year in 2008 looming, BIAW began laying a solid foundation to elect a pro-business governor, property rights Supreme Court justices and pro-housing legislators.*

**Laying the Foundation**

For the first time since its inception, BIAW operated its *Walking for Washington* program in an "off-election" year. On any given afternoon from June through September, over 55 walkers in nine different legislative districts throughout the state were knocking on doors,

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<sup>8</sup> See footnote 2, *supra*.

<sup>9</sup> BIAW, 2006 Form 990, Line 17, Ex. G.

<sup>10</sup> Building Insight, January 2008, p. 2, Ex. H.

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gathering information and identifying voters—information that will be used during the 2008 election cycle to help elect BIAW endorsed candidates.

*One of BIAW President Doyle's top priorities in 2007 was to meet with each of BIAW's 15 local associations throughout the state and encourage local association leaders and members to become active participants in the upcoming elections, both financially and at the grassroots level. Through President Doyle's and BIAW leaders' efforts, 11 local associations pledged over \$500,000 for the upcoming election cycle. This much needed money will help BIAW's efforts to elect Dino Rossi, who announced his candidacy for governor late in 2007. BIAW was the first trade association in the state to endorse Rossi.*

...  
*While 2008 will be one of the busiest, most challenging years BIAW's Political Program has ever undertaken, BIAW's work in 2007 will have laid the groundwork for next year's political success.<sup>11</sup> (emphasis added).*

BIAW's website and newsletters and devotion of staff time also demonstrate that defeating Christine Gregoire is one of BIAW's primary goals for the period leading up to the 2008 election.

BIAW acknowledges that electoral activities are part of its primary purposes for achieving its policies. The BIAW's website lists its political program as one of its top programs. It states "*BIAW and BIAW's Political Action Committee, the Washington Affordable Housing Council, play an active role in Washington State elections, pouring a significant amount of time, energy and money into ensuring the election of pro-business and pro-housing candidates that support the building industry and the continued economic growth of the state.*" (emphasis added).

As a political committee, BIAW was required to file mandatory reporting of various kinds, and has failed to do so. Each such failure constitutes a separate violation of RCW 42.17.

**2. Both BIAW and MBA qualify as political committees under the "receiving" prong of the political committee test because they have solicited and received contributions for electoral activities through their "Just 10%" program.**

On an annual basis, the MBA conducts an electoral fundraising drive through its "Just 10%" campaign, asking certain members to donate a portion of their tax refunds to the MBA for its electoral work. The MBA's website describes the program as follows:

**Contribute to Just 10 Percent.** Members who receive a rebate through Return on Industrial Insurance (ROI) are encouraged to contribute to our association's Just 10 Percent program. *These contributions are used to help pay for our public policy*

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<sup>11</sup> BIAW, 2007 Annual Report, p. 14, Ex. I.

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*program, which elects and retains candidates friendly to the housing industry, while sweeping no-growth incumbents out of office. ... (emphasis added).*<sup>12</sup>

In 2007, the "Just 10%" program was a joint effort between BIAW and MBA, which MBA minutes describe as follows:

**BIAW - Just 10%.** *MBA's understanding with BIAW is that we will contribute anything over \$250,000 that we make from the Just 10% program to BIAW for their campaign war chest. At Semi-ah-Moo, they received approximately \$3.5 million from the excess of their ROI funds from other HBA's. MBA has sent out the first Just 10% letter, which will be followed up by a second from MBA. BIAW will do a 3rd letter stressing the importance of contributing to the Just 10%. (emphasis added).*<sup>13</sup>

The July 2007 "Just 10%" solicitations focused on the 2008 elections. Potential donors were told that the Just 10% money "elects and retains candidates friendly to the housing industry, while sweeping from office no-growth individuals."<sup>14</sup> The solicitation continued:

Here is a list of what we plan to do with the Just 10 Percent funds for MBA-endorsed candidates in targeted races:

- Conduct opinion polling on growth-related issues
- Provide candidate training and talking points on growth-related issues
- Identify voters who are supportive of our endorsed candidates
- Turn out identified voters to the polls
- Organize direct mail and phone calls in support of endorsed candidates

The August 2007 solicitation noted that "This November 2007 is a huge election. The makeup of the Snohomish County Council is at stake. The Mayor's seat in the city of Redmond is up as are many other critical council seats in both King and Snohomish Counties. We are also

<sup>12</sup> <http://www.mbaks.com/mbaks3c.cfm?SectionGroupsID=113&SectionListsID=251&PageID=1761>

<sup>13</sup> See MBA Chair Officers Meeting, September 17, 2007, MBA 1537, **Ex. J** (Just 10% mailings were designed to discuss the 2008 elections); MBA Email Correspondence, July 12, 2007, MBA 2992, **Ex. K** (agreement between BIAW and MBA that this money would be used for the governors race); MBA Email Correspondence, July 19, 2005, MBA 3002, **Ex. L** ("The Just 10% money we ask for back from those receiving checks goes to independent expenditures and other campaign services we provide for our candidates."); MBA Issues in Action Email, June 22, 2004, MBA 3049, **Ex. M** (Just 10% goes, in part, to independent expenditures for housing friendly elected officials); MBA Issues In Action Email, October 25, 2005, MBA 3054, **Ex. N** (Just 10% "helps elect those candidates who support our government affairs program" "Just 10% monies will pay for targeted expenditures to put our endorsed candidates over the top."); MBA Email Correspondence, July 9, 2007, MBA 3098, **Ex. O** (joint letters focus on 2008 election and non-partisan pitch for governor's race); MBA Email Correspondence, June 22, 2005, MBA 3132, **Ex. P** (Sam Anderson writes "We get the money for it by asking companies for another 10% of their Roll refund to be used only for political campaigns.")

<sup>14</sup> July 6, 2007 "Just 10%" fundraising letter, **Ex. Q**.



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looking ahead to 2008 legislative races and another battle for the Governor's mansion."<sup>15</sup> The final solicitation, sent in October 2007, promised to spend Just 10% funds to influence local races in the 2007 election.<sup>16</sup> The MBA asks contributors to the "Just 10%" to contribute by check made out to MBA.<sup>17</sup>

By September, 2007, contributors to the Just 10% program had already written checks to the MBA totaling \$130,000.<sup>18</sup> MBA Board Meeting minutes from November 19, 2007, indicate that \$100,000 of these funds was earmarked for the Governor's race.<sup>19</sup> The MBA also earmarked \$500,000 in other funds for the Governor's race. In addition, in 2007 MBA sent over \$63,000 to the BIAW's political action committee, the Washington Affordable Housing Council.

In *EFF*, the Court adopted the analysis from 1973 AGO Opp. No. 114 for proposition that "When an organization is funded by membership dues, it is a 'receiver of contributions' if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonable should know, of this political use." 11 Wn.App. at 602-603. MBA and BIAW meet this test and should have reported their financial affairs and political activities as political committees. Each failure to do so constitutes a separate violation of RCW Chapter 42.17.

A similar issue is presented by the MBA's receipt of per-unit dues, which are collected from each multi-unit housing developer as part of annual membership dues. The MBA has dedicated such per-unit dues for electoral activities,<sup>20</sup> and separately accounts for them, which qualifies them as political contributions received by the MBA.

**3. The BIAW and MBA failed to timely report their receipt of contributions received and/or earmarked for political activities, and failed to properly report the expenditure of such funds.**

In this state, the amassing of a multi-million dollar campaign fund must be publicly reported. These funds are already being spent on activities related to the 2008 governor's race, through the BIAW, MBA and through affiliated political committees.<sup>21</sup> As of the date of this

<sup>15</sup> August 30, 2007 "Just 10%" fundraising letter, Ex. R.

<sup>16</sup> October 12, 2007 "Just 10%" fundraising letter, Ex. S.

<sup>17</sup> See August 17, 2006 "Just 10%" fundraising letter (with remit), Ex. T.

<sup>18</sup> Ex. J.

<sup>19</sup> MBA Board Meeting Minutes, November 19, 2007, MBA 1382, Ex. U.

<sup>20</sup> See MBA Email Correspondence, June 22, 2005, MBA 3132, Ex. P.

<sup>21</sup> See BIAW 2007 Annual Report (discussing 2007 work laying foundation for electoral victories in 2008), Ex. I. The majority of the BIAW's political expenditures are being transferred to Walking for Washington, Changepac, and It's Time For a Change. These organizations all share offices and staff with BIAW.

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filing, neither BIAW nor MBA have publicly disclosed these contributions and/or pledges to the "Just 10%" campaign or the BIAW's 2008 political war chest.

It is clear that the policies of RCW 42.17 require this magnitude of campaign fundraising to be reported in some manner. The purposes of RCW 42.17 state that it is public policy of the State of Washington "(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided; ... (10) That the public's right to know of the financing of political campaigns ... far outweighs any right that these matters remain secret and private. ... The provisions of this chapter shall be liberally construed to promote complete disclosure of all information regarding the financing of political campaigns and lobbying..."

Notifiers believe that these contributions must be reported under one or more of the following legal theories: (1) BIAW and MBA are political committees that are required to fully report, as previously discussed above;<sup>22</sup> (2) these contributions constituted "earmarked" contributions that BIAW was required to report within two days of their receipt; and/or (3) improper coordination disqualified these contributions and subsequent expenditures as "independent expenditures" and, therefore, they should have been reported by the candidate as direct contributions.<sup>23</sup>

The 2008 Campaign Disclosure Instructions for State Executive and Legislative Candidates describe that "Receipt of an earmarked contribution must be reported by the intermediary or conduit to both PDC and the benefiting candidate or committee within two days using form Special Report E." See RCW 42.17.670 (Contributions that are "earmarked" for a particular political committee must be reported by the person or entity making the contribution); RCW 42.17.135 (political committee or candidate receiving a contribution earmarked for the benefit of another committee or campaign shall report the contribution under RCW 42.17.080 and .090 and provide other notices).

Here, the donor organizations intended that this money they sent to the BIAW would flow through the BIAW to its independent expenditure committees ChangaPAC and It's Time for a Change, and ultimately would be spent to influence the governor's race. This is exactly what has happened. The failure to report such major campaign fundraising, as occurred here, violates the spirit and the letter of RCW 42.17.

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<sup>22</sup> Political committees are required to file campaign finance reports pursuant to RCW 42.17.080(1) and (2). These reports must disclose contributions, including pledges. 42.17.090, RCW 42.17.020 15(a)(i)(defining contribution to include pledges). 42.17.565 "A payment for *or promise to pay* for any electioneering communication shall be reported to the commission by the sponsor on forms the commission shall develop by rule to include, at a minimum, the following information." (emphasis added).

<sup>23</sup> Notifiers claim that the expenditures being made out of BIAW's "campaign war chest" do not qualify as independent expenditures pursuant to RCW 42.17 and, therefore, the BIAW should be subject to the campaign contribution limits set forth in state law.



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In addition, expenditures of moneys from these sources are being improperly reported as if originating from the conduit organization, without disclosure of their actual donors, which is a violation of RCW 42.17. See RCW 42.17.730 (prohibiting use of intermediary to make contribution without disclosure of source); RCW 42.17.120 (generally prohibiting concealment of source of contribution).

**4. The BIAW operated as a political committee during its well publicized efforts to influence 2006 Washington State Supreme Court races.**

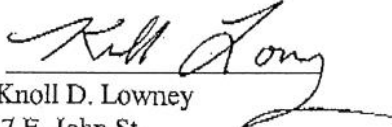
Notifiers believe that the BIAW was also acting as a political committee when it spent over \$1.4 million in two races for the Washington State Supreme Court in 2006. During the period leading into the 2006 primary and general election, winning these two judicial races and other races was one of BIAW's primary purposes and a primary strategy for achieving its political goals.

Notifiers intend to sue for all violations, including those yet to be uncovered and those committed subsequent to the date of this notice of intent to sue. Notifiers believe that this Notice sufficiently states grounds for filing suit. We intend, at the close of the notice periods, or shortly thereafter, to file a citizen's action against the above-named entities under RCW 42.17.400(4) for violations of the Public Disclosure Act, RCW Chapter 42.17. If you have any questions or concerns regarding this Notice, please contact the undersigned attorneys.

Very Truly Yours,

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